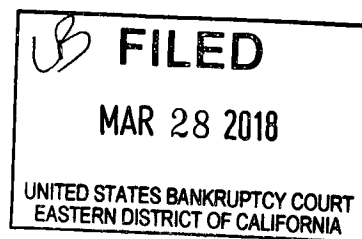


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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re:

OAKHURST LODGE, INC.

Debtor.

Case No. 11-17165-A-11

MEMORANDUM

AJM-3

Argued and submitted on November 15, 2017

at Fresno, California

Honorable Fredrick E. Clement, Bankruptcy Judge Presiding

Appearances:

Donna M. Standard, Attorney at Law, for  
Oakhurst Lodge, Inc.; Aaron J. Malo and  
Robert K. Sahyan, Sheppard, Mullin,  
Richter & Hampton, LLP for First-Citizens  
Bank & Trust Company; Sonia Plesset  
Edwards, Wright, Finlay & Zak, LLP for  
Total Lender Solutions, Inc.; Michael  
Heath, Law Offices of Michael Heath, for  
Oakhurst Lodge, LP; Steven K. Marshall, in  
propria persona

1 A debtor that owned and operated a motel encumbered by a bank's  
2 liens filed chapter 11<sup>1</sup> bankruptcy. It confirmed a reorganization plan  
3 that maintained the automatic stay in effect post-confirmation and  
4 restructured its secured and unsecured debt. The confirmed plan  
5 binds. It obligates the debtor to pay creditors over time the amounts  
6 specified in the plan and creditors to withhold collection efforts  
7 while receiving their plan payments.

8 But the bank violated the stay by foreclosing its liens. This  
9 violation precluded the debtor from paying creditors the amount  
10 promised in the plan. Later, the debtor and the bank settled the  
11 stay-violation dispute for one-half of the amount promised to  
12 creditors under the plan. The settlement also did not disturb the  
13 foreclosure sale or restore ownership of the motel to the debtor. At  
14 the bank's request, should the court now enforce the settlement?

15 **I. FACTS**

16 **A. Chapter 11 Filing**

17 Oakhurst Lodge Inc. ("Oakhurst Lodge") owned and operated a 60-  
18 room motel. It had several shareholders including Steven Marshall  
19 ("Marshall"), Chet Patel, and Sam Patel.

20 Unable to meet its financial obligations and wishing to continue  
21 operations, it filed a chapter 11 bankruptcy. Its most significant  
22 asset was the motel, as well as the fixtures, furniture and equipment  
23 necessary to operate it. Liabilities included seven secured debts,  
24 aggregating \$3.9 million dollars.<sup>2</sup> The bulk of its secured debt

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25  
26 <sup>1</sup> Unless specified otherwise, all chapter and section references are to the  
27 Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the  
28 Federal Rules of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule"  
references are to the Federal Rules of Civil Procedure, Rules 1-86.

<sup>2</sup> The amounts due each creditor or class of creditors are referenced in the

1 encumbered the motel and the land on which it sits. Those secured  
2 creditors include: (1) First-Citizens Bank & Trust Company ("First-  
3 Citizens Bank"), which held notes for \$3.08 million dollars secured by  
4 first and second trust deeds; (2) the Collier Partnership ("Collier  
5 Partnership"), which held a note for \$324,000 secured by a third trust  
6 deed; (3) the Olsen Family Trust ("Olsen Trust"), which held a note  
7 for \$392,000 secured by a fourth trust deed; and (4) the County of  
8 Madera, which was owed secured real property taxes of \$125,000.  
9 Oakhurst also owed priority unsecured tax debt of \$202,000,<sup>3</sup> non-  
10 priority unsecured debt owed to non-insiders of \$112,000,<sup>4</sup> and non-  
11 priority unsecured debt owed to insiders of \$493,000.<sup>5</sup>

12 Oakhurst Lodge proposed, and confirmed, a five-year plan of  
13 reorganization. Funded by a one-time capital contribution of \$230,000  
14 from shareholders and by 60 monthly payments of \$31,000 to \$33,000  
15 from motel operations, the plan had five key components. First, it  
16 restructured the secured debts owed to First-Citizens Bank, the  
17 Collier Partnership, and the Olson Trust. It reamortized First-

18  
19 Debtor's Combined Disclosure Statement and Plan of Reorganization §§ 6.01-  
20 6.10, Nov. 9, 2011, ECF No. 79, the Amended Exhibits for Chapter 11 Plan and  
21 Disclosure Statement Ex. B, Jan. 26, 2012, ECF No. 118, and the Order  
22 Confirming Debtor's Plan of Reorganization Ex. A (Stipulation Resolving  
23 Objection), Feb. 29, 2012, ECF No. 124. Amounts due creditors are rounded to  
24 the nearest thousand dollars.

25 <sup>3</sup> Unsecured priority tax debt comprises the following debts: a \$5,000 debt to  
26 the Franchise Tax Board; a \$4,000 debt to the California Employment  
27 Development Department; a \$150,000 debt to the County of Madera; and a  
28 \$43,000 debt to the Internal Revenue Service. See Debtor's Combined  
Disclosure Statement and Plan of Reorganization § 4.02, Nov. 9, 2011, ECF No.  
79; Order Confirming Debtor's Plan of Reorganization Ex. A (Stipulation  
Resolving Objection ¶ 2), Feb. 29, 2012, ECF No. 124.

<sup>4</sup> Non-insider unsecured claims total \$111,847.16. See Am. Exs. for Ch. 11.  
Plan and Disclosure Stmt. Ex. B, Jan. 26, 2012, ECF No. 118.

<sup>5</sup> Am. Exs. for Ch. 11 Plan and Disclosure Stmt. Ex. B at 1 (column 9, line  
26).

1 Citizens Bank's notes with a 22-year period of monthly payments and  
2 the entire debt becoming due and payable at the end of the 22-year  
3 period. It deferred payments for 12 months on the Collier  
4 Partnership's secured debt, added accrued but unpaid interest to the  
5 principal amount of the debt, reamortized the debt over 30 years with  
6 an interest rate of 5.5% and with monthly payments commencing in the  
7 13th month following confirmation, and fixed a maturity date on the  
8 entire debt that was 11 years after plan confirmation. It deferred  
9 payments on the Olson Trust's secured debt until First-Citizens Bank's  
10 entire secured debt was paid in full, provided an interest rate of 6%  
11 on such debt, and fixed a maturity date on the entire debt falling  
12 immediately after payment of First-Citizens Bank's secured debt. Each  
13 of these creditors retained its lien.

14 Second, excepting unsecured debt due insiders, over its five-year  
15 life, the plan paid (usually with interest) short-term secured debt,  
16 priority tax debt, and unsecured debt. The secured property tax debts  
17 owed to Madera County were to be paid in full with 5% interest. Both  
18 debts secured by personal property were reamortized over 5 years and  
19 were to be paid in full including 4% interest. Priority unsecured tax  
20 debt was to be paid in full plus unquantified statutory interest.  
21 Unsecured debts held by non-insiders were to be paid in full without  
22 interest. The plan paid insider unsecured creditors nothing.

23 Third, the rights of existing equity holders were terminated. In  
24 exchange for a capital contribution of \$230,000, Steven Marshall and  
25 Jack Patel became the new equity holders, each having an equal  
26 interest in Oakhurst Lodge.

27 Fourth, the plan deferred the discharge until completion of  
28 payments under the plan. It did not revest estate property upon

1 confirmation in Oakhurst Lodge as a reorganized debtor. Thus, it  
2 retained the protections of the automatic stay over the 5-year  
3 lifespan of the confirmed plan.

4 Fifth, the plan reserved to Oakhurst Lodge all claims and rights  
5 against third parties, regardless of whether they arose before or  
6 after the petition or whether they arose before or after confirmation.

7 At confirmation, unpaid professional fees aggregated \$12,000.<sup>6</sup>  
8 And the plan obligated Oakhurst Lodge to pay these administrative  
9 expenses in full in cash after such amounts were allowed by the court.<sup>7</sup>

10 Unfortunately, Oakhurst Lodge did not fully perform its  
11 obligations under the confirmed plan.<sup>8</sup>

12 **B. Foreclosure Sale**

13 Four months after confirmation, First-Citizens Bank commenced  
14 proceedings to foreclose its trust deeds encumbering the motel. It  
15 did not first obtain relief from the automatic stay. Approximately  
16 ten months after plan confirmation, the bank completed its  
17 foreclosure. At the foreclosure sale, First-Citizens Bank was the  
18 successful bidder and acquired title to the property.

19 After acquiring title to the motel, First-Citizens Bank evicted  
20 Oakhurst Lodge, Inc. and sold the motel to Oakhurst Lodge, LP, an  
21

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22 <sup>6</sup> See Order, Mar. 9, 2012, ECF No. 132; Order, Apr. 4, 2012, ECF No. 134.

23 <sup>7</sup> See Debtor's Combined Disclosure Statement and Plan of Reorganization  
24 § 4.04, Nov. 9, 2011, ECF No. 79.

25 <sup>8</sup> At oral argument, the parties agreed that Oakhurst Lodge did not fully  
26 perform its obligations under the plan. Oakhurst contends that there was  
27 partial performance; First-Citizens Bank contends there was no performance.  
28 Only one post-confirmation report shows distributions to creditors.  
Quarterly Post-Confirmation Report for Reorganized Debtor, Dec. 21, 2012, ECF  
No. 167 (showing total distributions of \$126,536.70). In addition, Steven  
Marshall contended at oral argument that he, but not Jack Patel, made the  
capital contributions required by the plan.

1 entity similar in name but unrelated to Oakhurst Lodge. Oakhurst  
2 Lodge, LP has operated the motel since acquiring it.

3 **C. Conversion and Dismissal**

4 About the time that First-Citizens Bank completed its foreclosure  
5 sale, the U.S. Trustee filed its motion to convert the case to chapter  
6 7 or dismiss it. It did so because Oakhurst Lodge had not filed three  
7 post-confirmation quarterly operating reports and had not paid the  
8 post-confirmation fees due the U.S. Trustee. This court granted the  
9 motion and converted the case to chapter 7.

10 Shortly after his appointment, the chapter 7 trustee gave notice  
11 of an intent to abandon the "60-unit motel with residence" and "all  
12 fixtures and equipment involved in the operation of the motel." When  
13 timely opposition was not filed in response, the trustee abandoned the  
14 motel, residence, and the fixtures and equipment used for its  
15 operation.<sup>9</sup>

16 After Oakhurst Lodge failed to appear at two meetings of  
17 creditors, the trustee moved to dismiss the chapter 7 case. The court  
18 dismissed the case. The chapter 7 trustee issued a report of no  
19 distribution, and the clerk closed the case.

20 **D. Stay-Violation Litigation**

21 Next, Oakhurst Lodge commenced an action against First-Citizens  
22 Bank in state court. This litigation continued unresolved for two  
23 years.

24 It then filed an adversary proceeding in bankruptcy court against  
25 First-Citizens Bank, Oakhurst Lodge, LP (the ultimate buyer of the

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26  
27 <sup>9</sup> After the trustee abandoned the motel, Oakhurst Lodge, Inc., acting in  
28 propria persona through its president Steven Marshall filed an untimely  
opposition to the abandonment.

1 motel), and Total Lender Solutions (the party who conducted the sale).  
2 Though the adversary complaint pleads causes of action for quiet  
3 title, cancellation of instruments, constructive trust, and civil  
4 contempt, the factual basis for each claim is the foreclosure of the  
5 motel in violation of the stay.

6 **E. Mediation and Settlement**

7 In the adversary proceeding, this court ordered the parties to  
8 mediation and appointed a mediator. After mediation, the parties  
9 reached a resolution of the dispute and reduced their settlement to  
10 writing.<sup>10</sup> Marshall signed the settlement agreement as president of  
11 Oakhurst Lodge. Notwithstanding admonitions by the court prior to the  
12 mediation, Marshall believed that any settlement funds received need  
13 not be remitted to creditors according to the terms of the confirmed  
14 plan.

15 The settlement required approval by this court. It provided  
16 First-Citizens Bank would waive any right to further payment under its  
17 notes secured by the first and second deeds of trust and would pay  
18 Oakhurst Lodge \$850,000 in exchange for a release of claims and  
19 dismissal of pending litigation.<sup>11</sup> The settlement contains an implied  
20 corollary: First-Citizens Bank's foreclosure sale would remain  
21 effective and its buyer would retain the motel.

22  
23  
24 <sup>10</sup> First-Citizens Bank's Status Report Ex. B (Stipulation for Settlement),  
July 11, 2016, ECF No. 205.

25 <sup>11</sup> First-Citizens Bank's Status Report Ex. B (Stipulation for Settlement  
26 ¶ 14), July 11, 2016, ECF No. 205. These terms of the settlement were also  
27 represented to the court by First-Citizens Bank at a September 2016 status  
28 conference and at oral argument on the present motion to enforce the  
settlement. Am. Civil Minutes at 1, *Oakhurst Lodge, Inc. v. First-Citizens  
Bank & Trust Company*, Adv. No. 15-1017 (Bankr. E.D. Cal. Sept. 20, 2016), ECF  
No. 255.

1           **F.     Vacated Orders**

2           Later, this court vacated the order converting the case to  
3 chapter 7 and the order dismissing the chapter 7. This restored  
4 Oakhurst Lodge's case to chapter 11.

5           **II.    PROCEDURE**

6           Oakhurst Lodge, acting through Marshall, repudiated the  
7 settlement agreement with First-Citizens Bank. First-Citizens Bank  
8 has responded by filing the present motion to enforce the settlement  
9 agreement.

10          The other adversary proceeding defendants have joined in the  
11 motion. Oakhurst Lodge and Steven Marshall, acting as an equity  
12 holder, oppose the motion.

13          **III.  JURISDICTION**

14          This court has jurisdiction to decide this motion. At the outset  
15 of a chapter 11 case, the bankruptcy court's subject matter  
16 jurisdiction extends not only to the case but also to civil  
17 proceedings arising under title 11 or arising in or related to the  
18 case. 28 U.S.C. § 1334(a)-(b); *see also* General Order No. 182 of the  
19 Eastern District of California. The court also has broad subject  
20 matter jurisdiction over all property of the debtor as of the  
21 commencement of the case and all property of the estate. 28 U.S.C.  
22 §§ 1334(e); *see also In re Millenium Seacarriers, Inc.*, 419 F.3d 83,  
23 96 (2d Cir. 2005). After confirmation of a plan, bankruptcy courts  
24 continue to have jurisdiction over civil proceedings arising under  
25 title 11 or arising in a case. But bankruptcy courts only retain  
26 "related to" jurisdiction over matters that bear a close nexus to the  
27 case, i.e., matters that affect the interpretation, implementation,  
28 consummation, execution, or administration of the confirmed plan.



1 *Wilshire Courtyard v. Cal. Franchise Tax Board (In re Wilshire*  
2 *Courtyard)*, 729 F.3d 1279, 1284-87 (9th Cir. 2013). And ancillary  
3 jurisdiction provides a federal court a jurisdictional basis to  
4 enforce a settlement agreement before dismissal of an underlying civil  
5 action over which the court already has jurisdiction. *T Street Dev.,*  
6 *LLC v. Dereje and Dereje*, 586 F.3d 6, 10 (D.C. Cir. 2009); *Bryan v.*  
7 *Erie County Office of Children and Youth*, 752 F.3d 316, 322 (3d Cir.  
8 2014).

9 Similarly, as this dispute is a core proceeding, this court may  
10 issue final orders and judgments resolving it. Bankruptcy judges may  
11 issue final orders and judgments in matters that are core, and absent  
12 consent of the parties, bankruptcy judges may hear—but not finally  
13 decide—matters that are noncore. 28 U.S.C. § 157(b)(1), (c)(1).  
14 Matters such as plan confirmation and settlements that materially  
15 modify the terms of a confirmed chapter 11 plan are core proceedings.  
16 See *id.* § 157(b)(2)(L); see also *In re U.S. Brass Corp.*, 301 F.3d 296,  
17 303-06 (5th Cir. 2002). And actions asserting stay violations, as the  
18 underlying action here, are core proceedings. *Id.* § 157(b)(2)(A),  
19 (G), (O); compare *In re Goodman*, 991 F.2d 613, 616-17 (9th Cir. 1993)  
20 (stay-violation actions arising under the Bankruptcy Code), with  
21 *Rosner v. Worcester (In re Worcester)*, 811 F.2d 1224, 1229 n. 5 (9th  
22 Cir. 1987) (proceedings related to foreclosure sale's validity arising  
23 from state-created rights).

#### 24 **IV. DISCUSSION**

##### 25 **A. Law Governing Settlement**

26 A party seeking to enforce a settlement carries the burden of  
27 demonstrating the existence of a legally enforceable agreement.  
28 *Andreyev v. First Nat'l Bank of Omaha (In re Andreyev)*, 313 B.R. 302,

1 305 (9th Cir. BAP 2004).

2 In the absence of controlling federal authority, state law  
3 governs the enforceability of settlement agreements. *O'Neil v. Bunge*  
4 *Corp.*, 365 F.3d 820, 822 (9th Cir. 2004); *United Comm. Ins. Servs.,*  
5 *Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992). "A  
6 settlement agreement is a contract, and the legal principles which  
7 apply to contracts generally apply to settlement contracts."  
8 *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 810 (1998).  
9 "The essential elements of a contract are: parties capable of  
10 contracting; the parties' consent; a lawful object; and sufficient  
11 cause or consideration." *Lopez v. Charles Schwab & Co.*, 118 Cal. App.  
12 4th 1224, 1230 (2004).

13 Settlements between the trustee (or debtor-in-possession) and a  
14 third party affecting property of the estate have long been subject to  
15 controlling federal authority requiring court approval. *Lincoln Nat'l*  
16 *Life v. Scales*, 62 F.2d 582, 585 (5th Cir. 1933) (citing § 27 of the  
17 Bankruptcy Act, the court held the trustee "may not compromise or  
18 arbitrate anything except under the court's approval"); *Matter of*  
19 *Nat'l Pub. Serv. Corp.*, 68 F.2d 859, 862 (2nd Cir. 1934) (bankruptcy  
20 court always has the last word with respect to compromises).

21 As a result, the existence of a binding contract between the  
22 parties is a necessary but not sufficient basis to enforce a  
23 settlement agreement. Absent bankruptcy, the settlement would be  
24 enforceable under California law. The central question then is the  
25 effect of bankruptcy law on the bargained-for resolution.

#### 26 **B. The Effect of Plan Confirmation**

27 Confirmation of a chapter 11 plan binds the debtor, creditors,  
28 and equity security holders. 11 U.S.C. § 1141(a) ("the provisions of

1 a confirmed plan bind"); *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir.  
2 1995). Moreover, the confirmation order has res judicata effect on  
3 issues that were raised in conjunction with plan confirmation or could  
4 have been raised at that time. *Prudence Realization Corp. v. Ferris*,  
5 323 U.S. 650, 654-55 (1944); *Katchen v. Landy*, 382 U.S. 323, 334  
6 (1966); *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

7 As applicable here, the binding nature of the plan cuts two ways.  
8 In the first instance, it cuts against First-Citizens Bank by  
9 requiring it to withhold collection efforts, including foreclosure.  
10 11 U.S.C. §§ 362(a), (c), 1141(b), (d)(1). The stay protects the  
11 debtor, the debtor's property, and property of the estate. *In re*  
12 *Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (9th Cir. BAP 1982).  
13 Ordinarily, in chapter 11 the stay terminates as to the debtor and as  
14 to the estate upon confirmation of the plan. 11 U.S.C. §§ 362(c),  
15 1141(b), (d)(1)(A). But chapter 11 debtors may extend the in personam  
16 and in rem protections of the stay beyond confirmation by deferring  
17 (i) discharge and (ii) revesting of estate property in the debtor.  
18 See *id.*; *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n.*, 997 F.2d  
19 581, 587 (9th Cir. 1993). Here, Oakhurst Lodge availed itself of  
20 these extended-stay protections in the plan. This bound First-  
21 Citizens Bank and required it to withhold foreclosure proceedings  
22 against the motel unless and until it obtained an order granting stay  
23 relief. When First-Citizens Bank foreclosed its liens on the motel  
24 and evicted Oakhurst Lodge without seeking stay relief, it ended  
25 Oakhurst Lodge's efforts to reorganize and damaged other creditors in  
26 the amount that the plan had promised each creditor.

27 In the second instance, the binding nature of the plan cuts  
28 against Oakhurst Lodge. Confirmed plans resemble consent decrees,

1 which have characteristics of both a contract and a judgment. *Hillis*  
2 *Motors*, 997 F.2d at 588 (citing *Rufo v. Inmates of Suffolk County*  
3 *Jail*, 502 U.S. 367, 378 (1992)). The plan obligated Oakhurst Lodge to  
4 pay First-Citizens Bank the secured debt specified in the plan. And  
5 absent relief from the confirmation order or a court-approved  
6 modification of the plan, it continues to bind Oakhurst Lodge and  
7 restricts its freedom to settle disputes with third parties in a  
8 manner that reduces the amount creditors will receive under the terms  
9 of the confirmed plan.

10 **C. Subsequent Events**

11 **1. Conversion and dismissal**

12 The court next considers the effect of the conversion and dismissal of  
13 the case on the confirmed plan. While there is no case directly on  
14 point, Ninth Circuit authority suggests limited circumstances under  
15 which the binding effect of a confirmed chapter 11 plan may be  
16 vacated. These circumstances include (1) a successful appeal of the  
17 confirmation order, *In re Lowenschuss*, 170 F.3d 923, 932 (9th Cir.  
18 1999); (2) a revocation of such order within 180 days if confirmation  
19 was procured by fraud, 11 U.S.C. § 1144; *In re Orange Tree Assocs.,*  
20 *Ltd.*, 961 F.2d 1445, 1447 n. 6 (9th Cir. 1992); and (3) a motion for  
21 relief from such order based on lack of notice to the affected  
22 creditor, *In re Downtown Investment Club III*, 89 B.R. 59 (9th Cir. BAP  
23 1988). The binding nature of a confirmed plan is such that a debtor  
24 may not modify it by filing a second chapter 11 case, absent a showing  
25 of a "fundamental change" in market conditions. *In re Caviata*  
26 *Attached Homes, LLC*, 481 B.R. 34, 46-48 (9th Cir. BAP 2012) (affirming  
27 dismissal of the subsequent chapter 11 because the "changed  
28 circumstances were not unforeseeable"). But "[i]mproper plan

1 provisions do not remove the res judicata effect of plan  
2 confirmation." *In re Ground Sys., Inc.*, 213 B.R. 1016, 1019-20 (9th  
3 Cir. BAP 1997).

4 Moreover, conversion of a chapter 11 case to chapter 7 does not  
5 vacate the order confirming the plan. See 11 U.S.C. § 348 (omitting  
6 any reference to §§ 1129 and 1141). And courts that have squarely  
7 confronted the issue hold that conversion does not vitiate the binding  
8 nature of the plan. *Still v. Rossville Bank (In re Chattanooga*  
9 *Wholesale Antiques, Inc.)*, 930 F.2d 458 (6th Cir. 1991) (trustee not  
10 allowed to avoid debtor's payments to creditors under the terms of a  
11 confirmed chapter 11 plan made before conversion to chapter 7); *Bank*  
12 *of La. v. Pavlovich (Matter of Pavlovich)*, 952 F.2d 114 (5th Cir.  
13 1992) (creditor could not object to discharge or dischargeability of  
14 preconfirmation debts after chapter 11 plan had discharged debts);  
15 *Laing v. A.G. Johnson (In re Laing)*, 31 F.3d 1050 (10th Cir. 1994)  
16 (stipulation that a particular debt was non-dischargeable as a part of  
17 a chapter 11 proceeding bound debtor after case was converted to  
18 chapter 7); *In re Troutman Enters., Inc.*, 253 B.R. 8, 13 (6th Cir. BAP  
19 2000); *In re BNW, Inc.*, 201 B.R. 838, 850 (S.D. Ala. 1996).

20 Admittedly, the answer to the same question after conversion from  
21 chapter 13 is different. See *Harris v. Viegelahn*, 135 S. Ct. 1829,  
22 1838 (2015) (citing § 103(i)) ("When a debtor exercises his statutory  
23 right to convert, the case is placed under Chapter 7's governance, and  
24 no Chapter 13 provision holds sway."). And an argument might be  
25 advanced for applying *Viegelahn's* logic in the context of a case  
26 converted from chapter 11 to chapter 7. To begin with, § 103(g)  
27 provides: "Except as provided in section 901 of this title,  
28 subchapters I, II, and III of chapter 11 of this title apply only in a

1 case under such chapter." Section 1141(a)'s provision that a  
2 confirmed chapter 11 plan binds falls within § 103(g)'s scope, so it  
3 could be argued that § 1141(a) would no longer apply after a  
4 conversion to chapter 7. If § 1141(a) no longer applies, then  
5 confirmed chapter 11 plans can no longer bind the parties after  
6 conversion from chapter 11 to chapter 7.

7 While facially appealing, the court rejects this argument. A  
8 Ninth Circuit decision has stated that "section 1144 is the only  
9 avenue for revoking confirmation of a plan of reorganization." *In re*  
10 *Orange Tree Assocs., Ltd.*, 961 F.2d 1445, 1447 n.6 (9th Cir. 1992)  
11 (quoting *In re Longardner & Assoc., Inc.*, 855 F.2d 455, 460 (7th Cir.  
12 1988)). And this precedent implies that a chapter 11 plan's binding  
13 effect survives conversion to chapter 7 or dismissal.

14 Further, while both chapter 13 and chapter 11 of the Bankruptcy  
15 Code contain a provision allowing a court to vacate a confirmation  
16 order procured by fraud, those provisions are notably different.  
17 Section 1144 provides, "On request of a party in interest at any time  
18 before 180 days after the date of the entry of the order of  
19 confirmation, and after notice and a hearing, the court may revoke  
20 such order **if and only if** such order was procured by fraud." 11  
21 U.S.C. § 1144 (emphasis added). Contrast this language with § 1330's  
22 language on revocation of a confirmed chapter 13 plan: "On request of  
23 a party in interest at any time within 180 days after the date of the  
24 entry of an order of confirmation under section 1325 of this title,  
25 and after notice and a hearing, the court may revoke such order **if**  
26 such order was procured by fraud." *Id.* § 1330(a) (emphasis added).

27 Section 1330 allows revocation if plan confirmation was procured  
28 by fraud but does not exclude other bases for reversing the binding

1 effect of the confirmation order after conversion, e.g., §§ 103(i) and  
2 348(e). But § 1144's use of the phrase "if and only if" restricts the  
3 basis for revocation of the confirmation order to the procuring of  
4 such order by fraud, and this restriction excludes other bases for  
5 revocation after conversion, e.g., §§ 103(g) and 348(a).

6 Moreover, unwinding the effect of a confirmed chapter 13 plan is  
7 more straightforward than unwinding the effect of a confirmed chapter  
8 11 plan. By inference, the finality of the confirmation order,  
9 therefore, retains more importance after conversion from chapter 11  
10 than it does after conversion from chapter 13. See *Caviata Attached*  
11 *Homes*, 481 B.R. at 46 (noting that reliance on the chapter 11  
12 confirmation order supports a strong need for finality).

13 After conversion from chapter 13, unwinding the effects of a  
14 confirmed but failed chapter 13 plan ordinarily is as simple as  
15 requiring the chapter 13 trustee to refund undistributed plan  
16 payments. See *Viegelahn*, 135 S. Ct. at 1837-40. Payments already made  
17 by the chapter 13 trustee during the life of the plan need not be  
18 unwound and recovered after conversion or dismissal. 11 U.S.C. §§  
19 348(f)(1)(A), 349(b), 549(a). And since conversion usually occurs  
20 before the chapter 13 discharge is entered, there is no need to  
21 disturb a discharge upon conversion. See *id.* § 1328(a) (discharge  
22 occurs only at the end of a confirmed plan's term after completion of  
23 plan payments). A chapter 13 case that is dismissed, moreover, merely  
24 falls out of the chapter 13 process, and parties are returned to the  
25 status quo ante.

26 Unlike chapter 13 plans, however, chapter 11 plans are frequently  
27 implemented by complex transactions that would be difficult, if not  
28 impossible, to disentangle after confirmation. Such transactions may

1 include transfers of property of the estate; mergers or consolidation  
2 of the debtor with other entities; cancellation of indentures; changes  
3 to the interest rate or other terms of outstanding securities;  
4 amendment of the debtor's charter; issuance of securities for cash,  
5 for property or existing securities. See 11 U.S.C. § 1123(a)(5)(B),  
6 (C), (F), (H)-(J). Chapter 11 plans may provide for the settlement or  
7 adjustment of claims or provide for the sale of estate property and  
8 distribution of the sale proceeds among holders of claims or  
9 interests. *Id.* § 1123(b). Usually, discharge of the debtor and  
10 revesting of estate property in the debtor occurs at confirmation.  
11 *Id.* § 1141(b), (d)(1). And it is for this reason that Congress made a  
12 measured choice in enacting § 1144 to allow a confirmation order to be  
13 revoked only under the narrowest circumstance.

14 In chapter 11, moreover, debtors, creditors, and third parties  
15 substantially change their position in reliance on the confirmation  
16 order. Considering this reliance rationale for the narrow ground for  
17 revocation under § 1144, one court stated:

18 Any number of scenarios can and do play out under  
19 the terms of a confirmed plan. Credit is  
20 extended, assets are sold, corporate entities are  
21 created or merged, and so on. Presumably mindful  
22 of the intricate chain of events that is often  
23 set in motion by the order of confirmation,  
Congress made the considered choice that only  
fraud would warrant an attempt to "unscramble the  
egg," and even then only within the 180-day time  
frame imposed by § 1144.

24 *In re Winom Tool & Die, Inc.*, 173 B.R. 613, 616 (Bankr. E.D. Mich.  
25 1994). Given these reliance interests in play, confirmed chapter 11  
26 plans have a binding effect that is durable.

27 Indeed, even dismissal of a chapter 11 case does not vacate the  
28 confirmation order. *Matter of Depew*, 115 B.R. 965, 967-68 (Bankr.



1 N.D. Ind. 1989) ("dismissal does not revoke debtors' discharge[,] and  
2 their obligations to creditors, as set forth in the confirmed plan,  
3 remain unaltered."); *In re Space Bldg. Corp.*, 206 B.R. 269, 274 (D.  
4 Mass. 1996) ("[C]ourts which have considered whether dismissal or  
5 conversion of a Chapter 11 case revokes a confirmed Plan, consistently  
6 have determined that it does not."); *U.S. v. Ramirez*, 291 B.R. 386,  
7 391-92 (N.D. Tex. 2002); *Am. Bank and Trust Co. v. United States ex.*  
8 *Rel. Internal Revenue Service (In re Barton Indus., Inc.)*, 159 B.R.  
9 954, 957-60 (Bankr. W.D. Okla. 1993).

10 In short, neither the conversion of Oakhurst Lodge's chapter 11  
11 case to chapter 7 nor the dismissal of its chapter 7 case affect the  
12 binding nature of the confirmed plan. In any event, any argument that  
13 the conversion or dismissal dissolved the confirmation order would be  
14 misplaced: the court vacated both the conversion and dismissal orders  
15 on First-Citizens Bank's Rule 60(b) motion. Once these orders were  
16 vacated, the case was returned to the status quo, with Oakhurst Lodge  
17 operating under the terms of the confirmed chapter 11 plan, see  
18 *Ballard v. Baldrige*, 209 F.3d 1160 (9th Cir. 2000), and reorganizing  
19 under the supervision of the bankruptcy court, see *Hillis Motors,*  
20 *Inc.*, 997 F.2d at 589.

## 21 2. The chapter 7 trustee's abandonment of the motel

22 The chapter 7 trustee's abandonment of the motel also does not  
23 impact Oakhurst Lodge's ability to seek redress for the stay  
24 violation. First, this court construes the chapter 7 trustee's  
25 abandonment narrowly. The trustee abandoned only an interest in a  
26 "60-unit motel with [a] residence" and "all fixtures and equipment  
27 involved in the operation of the motel." See 11 U.S.C. § 554(a); Fed.  
28 R. Bankr. P. 6007(a). The abandonment made no mention of either the

1 stay violation or the estate's right to seek redress for that wrong.

2 Second, even if the language of the trustee's abandonment were  
3 construed to include the right to redress the stay violation, the  
4 plan's reservation of claims to Oakhurst Lodge precluded the chapter 7  
5 trustee from abandoning this asset. The confirmed plan reserved to  
6 the debtor "all powers granted by the Bankruptcy Code," and Oakhurst  
7 Lodge preserved unto itself all "rights against any and all third  
8 parties" whether those "rights arose before, on or after the petition  
9 date, the confirmation date, the effective date and/or the  
10 distribution date." First-Citizens Bank's post-confirmation violation  
11 of the stay falls neatly within the rights and claims reserved to  
12 Oakhurst Lodge as the reorganized debtor. As a result, the trustee  
13 lacked the power to abandon that right despite the language of the  
14 abandonment.

15 Third, the trustee could not abandon any right held by the debtor  
16 to seek redress for violation of its in personam stay. As *Matter of*  
17 *S.I. Acquisition, Inc.*, 817 F.2d 1142, 1146-48 (5th Cir. 1987)  
18 explains, the stay has both in personam and in rem protections. The  
19 former protects the debtor, and the latter protects the estate.  
20 Section 362 provides:

21 [A] petition . . . operates as a stay, applicable  
22 to all entities, of—

23 (1) the commencement or continuation . . . of a  
24 judicial, administrative, or other action or  
25 proceeding **against the debtor** that was or could  
26 have been commenced before the commencement of a  
27 case under this title . . . ;

28 (2) the enforcement, **against the debtor or**  
**against property of the estate**, of a judgment  
obtained before the commencement of the case  
under this title;

(3) any act to obtain possession of **property of**

1       the estate or property from the estate or to  
2       exercise control over **property of the estate**;

3       (4) any act to create, perfect, or enforce any  
4       lien against **property of the estate**;

5       (5) any act to create, perfect, or enforce  
6       against **property of the debtor** any lien to the  
7       extent that such lien secures a claim that arose  
8       before the commencement of the case under this  
9       title;

10       (6) any act to collect, assess, or recover a  
11       claim **against the debtor** that arose before the  
12       commencement of the case under this title . . . .

13       11 U.S.C. § 362(a)(1)-(6) (emphases added). "An automatic stay is  
14       created by section 362(a) for benefit [sic] of the debtor; see, e.g.,  
15       paragraphs (1), (2), (6) [of § 362(a)]; the debtor's property,  
16       paragraph (5) [of § 362(a)]; or the debtor's estate, paragraphs (2),  
17       (3), (4) [of § 362(a)]." *In re Casgul of Nev., Inc.*, 22 B.R. 65, 66  
18       (9th Cir. BAP 1982); *accord Gasprom, Inc. v. Fatech (In re Gasprom)*,  
19       500 B.R. 598, 604-07 (9th Cir. BAP 2013) (notwithstanding trustee's  
20       abandonment of estate property, holding that the stay continued to  
21       protect property of the debtor under § 362(a)(5) and that post-  
22       petition foreclosure sale violated that stay). It follows that the  
23       debtor holds rights of redress for acts that violate § 362(a)(1), (2),  
24       (6), see *In re Goodman*, 991 F.2d 613, 619-20 (9th Cir. 1993), and the  
25       estate holds rights of redress for acts that violate §§ 362(a)(2)-(4),  
26       see *In re Pace*, 67 F.3d 187, 193-94 (9th Cir. 1995) (trustee).

27       And a single act can violate both the in rem rights of the estate  
28       and the in personam rights of the debtor. Such a single act occurred  
29       here. Specifically, First-Citizens Bank's foreclosure violated both  
30       the estate's in rem right to preserve property for the benefit of all  
31       creditors, see § 362(a)(3)-(4), and Oakhurst Lodge's in personam right  
32       to reorganize its business affairs without the interference of

creditors, see § 362(a)(6); see also *In re RW Meridian LLC*, 564 B.R. at 27-33 (finding post-petition tax sale of real property violated § 362(a)(3), (4), (6)); *Gasprom, Inc. v. Fatech (In re Gasprom)*, 500 B.R. at 604-07 (holding post-petition foreclosure sale violated the stay applicable to chapter 7 debtor under § 362(a)(5) notwithstanding the trustee's abandonment of the property sold at foreclosure sale); *In re Faitalia*, 561 B.R. 767, 774 (9th Cir. BAP 2016) (dicta stating that foreclosure of a lien after commencement of a case would violate § 362(a)(1), (4) and (6)); see also *In re Advanced Ribbons & Office Prods., Inc.*, 125 B.R. 259 (9th Cir. BAP 1991) (foreclosure of stock owned by non-debtor guarantor not a violation of the stay).

In brief, Oakhurst Lodge now holds rights-on behalf of both the estate and itself as a reorganized debtor-to pursue the stay violation occasioned by the foreclosure. This is true despite the chapter 7 trustee's abandonment of the motel, residence, and related property. The abandonment does not eliminate Oakhurst Lodge's standing, therefore, to pursue the underlying adversary action in which this motion to enforce a settlement arises.

#### **D. The Standard for Approval of the Settlement**

By what standard should approval of a post-confirmation compromise in chapter 11 between a reorganized debtor and a third party be approved or denied? Two rules jockey for position. Most courts inquire whether the settlement materially alters the terms of the confirmed plan under § 1127(b). See *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 747-48 (2nd Cir. 1992); *In re Ionosphere Clubs, Inc.*, 208 B.R. 812, 815-16 (S.D.N.Y. 1997); *In re U.S. Brass Corp.*, 301 F.3d 296, 303 (5th Cir. 2002) (applying § 1127(b) analysis despite bankruptcy court's application of Rule

1 9019); *SCH Corp. v. CFI Class Action Claimants*, 597 Fed. Appx. 143 \*4-  
2 \*5 (D. Del. 2015); *Reserve Capital Corp. v. Levine*, 2007 WL 329179 \*4  
3 (N.D.N.Y. Jan. 30, 2007) (finding settlement fair and equitable under  
4 Rule 9019 but remanding for failure to consider plan modification  
5 under § 1127(b)). But Some courts concern themselves solely with the  
6 good faith and fair and equitable standards of Rule 9019. *In re*  
7 *Hollywell Corp.*, 93 B.R. 291, 294-95 (Bankr. S.D. Fla. 1988); *In re*  
8 *Am. West Airlines, Inc.*, 214 B.R. 382, 385-86 (Bankr. D. Ariz. 1997);  
9 *In re Key3Media Group, Inc.*, 336 B.R. 87, 92-98 (Bankr. D. Del. 2005).

10 This court concludes that a post-confirmation settlement that  
11 materially changes the rights and duties of the reorganized debtor,  
12 creditors, or equity security holders must be reviewed under §  
13 1127(b)'s standards for plan modification. This is true despite the  
14 existence of alternative standards under Rule 9019 because a rule of  
15 procedure cannot override a substantive right provided for by the  
16 Bankruptcy Code when they conflict. See 28 U.S.C. § 2075; *In re Pac.*  
17 *Atl. Trading Co.*, 33 F.3d 1064, 1066 (9th Cir. 1994); *In re Wolfberg*,  
18 255 B.R. 879, 883 (9th Cir. BAP 2000), *aff'd*, 37 F. App'x. 891 (9th  
19 Cir. 2002). Indeed, § 1141(a) provides that a confirmed plan binds  
20 the debtor, creditors, and equity security holders as a "new contract"  
21 between the debtor and its creditors. *In re Dow Corning Corp.*, 456  
22 F.3d 668, 676 (6th Cir. 2006) (citing *Hillis Motors, Inc. v. Haw.*  
23 *Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir. 1993)). Any party  
24 wishing to alter the terms of this binding decree must do so by plan  
25 modification in the manner described in § 1127(b). And modifying the  
26 confirmed plan requires adherence to procedural safeguards for all  
27 parties affected, see § 1127(b), 1129, and Rule 3019(b), and  
28 compliance with specific statutory standards, §§ 1122, 1123, 1127(b),

1 and 1129. It follows that the terms of the confirmed plan and §  
2 1127(b) govern the enforcement of a post-confirmation settlement that  
3 materially changes the rights and duties of the parties affected by  
4 the confirmed plan.

5 In contrast to the standards governing chapter 11 plan  
6 modification, Rule 9019 operates under more discretionary standards  
7 articulated in *In re A & C Properties*. See *In re A & C Props.*, 784  
8 F.2d 1377, 1381 (9th Cir. 1982). Under these standards, the court may  
9 approve such a settlement if it was negotiated in good faith and is  
10 fair and equitable. *Id.* "Fair and equitable" involves a  
11 consideration of four factors: (i) the probability of success in the  
12 litigation; (ii) the difficulties to be encountered in collection;  
13 (iii) the complexity of the litigation, and the expense, delay and  
14 inconvenience necessarily attendant to the litigation; and (iv) the  
15 paramount interest of creditors and a proper deference to the  
16 creditors' expressed wishes, if any. *Id.* So applying these flexible  
17 standards to a settlement that changes creditors and equity holders'  
18 rights under a confirmed plan would undercut their procedural and  
19 substantive rights under §§ 1122, 1123, 1125, 1127(b), 1129 and  
20 1141(a).

21 This conclusion is consistent with long-held notions as to when a  
22 compromise or settlement is governed by Rule 9019 as opposed to other  
23 provisions of the Bankruptcy Code or Rules. Rule 9019 is silent on  
24 the subject. But current Rule 9019 derives from Section 27 of the  
25 former Bankruptcy Act of 1898 and former Rule 919, a rule that had  
26 been adapted from § 27 of the Bankruptcy Act. See *In re City of*  
27 *Stockton*, 486 B.R. 194, 196 (Bankr. E.D. Cal. 2013) (tracing the  
28 history of Rule 9019 from § 27 of the Act and noting that the Code

1 carried forward case law applicable to § 27). Section 27 of the  
2 former Bankruptcy Act provided as follows: "The trustee may, with the  
3 approval of the court, compromise any controversy arising in the  
4 administration of the estate upon such terms as he may deem for the  
5 best interests of the estate." Bankruptcy Act of 1898, § 27, Act of  
6 July 1, 1908, 30 Stat. 553-54, *as amended*, Chandler Act, § 27, Act of  
7 June 22, 1938, 52 Stat. 855, *repealed* 1979 (emphasis added). Section  
8 27 was thus "intended to supply a summary and inexpensive way of  
9 settling questions arising in the administration of bankrupt estates."  
10 *In re Ben L. Berwald Shoe Co.*, 1 F.2d 494, 496 (N.D. Tex. 1924), *rev'd*  
11 *on other grounds*, 10 F.2d 275 (5th Cir. 1926). But it was never  
12 intended to supplant those provisions of the Bankruptcy Act governing  
13 plan confirmation. See 2A *Collier on Bankruptcy* ¶ 27.02 & nn. 20-21  
14 (James Wm. Moore & Lawrence P. King eds., 14th ed. rev. 1978). It  
15 could not be used to restructure the relationship between debtors and  
16 creditors outside the authority of the Bankruptcy Act, forcing  
17 creditors to give up property rights, incur liabilities, and accept  
18 "many other provisions as are usually contained in a contract of  
19 reorganization." See *In re Northampton Portland Cement Co.*, 185 F.  
20 542, 543 (E.D. Pa. 1911); see also *In re Woodend*, 133 F. 593 (S.D.N.Y.  
21 1904). In this context, moreover, there is no principled way to  
22 distinguish settlements attempting plan modification from settlements  
23 attempting plan confirmation. Both are equally impermissible.

24       Given its roots in § 27 of the Bankruptcy Act, Rule 9019 likewise  
25 cannot displace the rigorous standards for plan confirmation and  
26 modification in chapter 11. Such standards cannot be jettisoned when  
27 settling a dispute that invokes their application. Rather, Rule 9019  
28 must yield.

1           **E.     The Settlement Modifies the Confirmed Plan**

2           Section 1127(b) controls plan modification. The term  
3           "modification" is not defined by the Bankruptcy Code. A settlement  
4           that "alters the legal relationships among the debtor and its  
5           creditors" under the confirmed plan constitutes a plan modification.  
6           *In re Ionosphere Clubs, Inc.*, 208 B.R. 812, 816 (Bankr. S.D.N.Y. 1997)  
7           (extension of time to assume or reject lease); *In re U.S. Brass Corp.*,  
8           301 F.3d 296, 303, 307 (5th Cir. 2002) (opting to settle claims by  
9           binding arbitration); *In re Joint E. and S. Dist. Asbestos Litig.*, 982  
10          F.2d 721, 747-48 (2nd Cir. 1992) (change in obligations and payment  
11          procedures for personal injury settlement trust deemed substantive and  
12          significant).

13                   **1.     Secured creditors rights are altered**

14          Under the terms of the confirmed plan, secured creditors,  
15          including the Collier Partnership and the Olsen Trust, bargained for  
16          and received under the terms of the confirmed plan a promise to pay  
17          the principal amount of their secured loans plus interest at 5.5% and  
18          6%, respectively. For example, the Collier Partnership was to receive  
19          a stream of income starting one year after confirmation with the  
20          entire amount due and payable 11 years after confirmation. The Olsen  
21          Trust agreed to defer all payments until the first and second trust  
22          deeds due First-Citizens Bank had been paid in full (estimated to be  
23          22 years after confirmation). But each creditor was to retain its  
24          lien until the entire amount of its principal and interest had been  
25          paid in full.

26          But the settlement does not pay secured creditors' claims in  
27          full. Because it fails to pay their claims in full, the settlement  
28          materially alters the rights of the secured creditors.



Equally important to the analysis is the settlement's endorsement of a foreclosure that eliminated junior liens. When First-Citizens Bank foreclosed its first and second trust deeds, it wiped out the liens held by the Collier Partnership and the Olsen Trust, leaving them with unsecured claims against Oakhurst Lodge. See Cal. Civ. Proc. Code § 580(d); *Bargioni v. Hill*, 59 Cal. 2d 121, 122, (1963); *Roseleaf Corp. v. Chierighino*, 59 Cal. 2d 35, 43-44, (1963). But actions, including foreclosures, taken in violation of the stay are void. *In re Gruntz*, 202 F.3d 1074, 1081-82 (9th Cir. 2000). Void acts cannot be cured or ratified. *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992). Except as to certain good faith purchasers, the void foreclosure sale may be set aside and the property returned to the estate. 11 U.S.C. § 549(a), (c).

Yet the settlement allows the wrongful foreclosure sale to stand, contravening the terms of the confirmed plan that afforded the Collier Partnership and the Olsen Trust retention of their liens until their secured claims were paid in full with interest. As a result, the settlement materially and impermissibly alters their bargained-for rights under the confirmed plan.

## **2. Unsecured creditors' rights are altered**

The settlement is insufficient to pay priority and general unsecured creditors, including deficiency claims held by the now sold-out third and fourth trust deed holders, under the terms of the confirmed plan. Including secured and unsecured debt, the amount necessary to fund the confirmed plan is approximately \$1.48 million.<sup>12</sup>

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<sup>12</sup> The amount due does not include: (1) amounts due First-Citizens Bank on its first and second trust deeds (as provided in the proposed settlement agreement); (2) "statutorily required" interest on priority tax claims; or (3) U.S. Trustee's fees. It also assumes no payments of any of these debts

1 Because the motel will not be returned to Oakhurst Lodge under the  
2 settlement's terms, there would never be additional funds for payment  
3 of creditors. The settlement therefore materially alters the modified  
4 plan as to unsecured creditors by paying them only slightly more than  
5 one-half of the amount provided for in the plan.

6 **3. Equity holders' rights are altered**

7 The plan provides that Oakhurst Lodge, as a reorganized debtor,  
8 would have two shareholders, Marshall and Jack Patel, who were  
9 obligated to contribute new value of approximately \$230,000. The  
10 record contains no admissible evidence as to whether this new-value  
11 contribution was ever made. First-Citizens Bank has not sustained its  
12 burden to show a lack of equity holders interests in Oakhurst Lodge  
13 having rights that must be satisfied under the confirmed plan.

14 The settlement alters the equity holders' rights under the plan.  
15 This is because the confirmed plan contemplated Oakhurst Lodge's  
16 emerging from the chapter 11 process operating the motel free of debt,  
17 except long-term secured debt. Depending on post-confirmation  
18 operating profits and the value of the motel, the equity interests

19  
20 \_\_\_\_\_  
21 by third parties, e.g., real property taxes due Madera County by the  
22 purchaser, Oakhurst Lodge, LP. Interest computations are made based on the  
23 passage of 1,705 days between the effective date, March 15, 2012, and the  
24 date of the hearing on the motion to enforce the settlement, November 15,  
25 2017.

26 As of the date of the hearing on the motion to enforce, the amount due under  
27 the plan was approximately \$1,481,878. This sum was calculated to include  
28 the following: (1) professional fees of \$12,000; (2) the Collier  
Partnership's claim of \$407,241 (\$324,000 principal + \$83,241 interest at  
5.5%); (3) the Olsen Trust's claim of \$501,867 (\$392,000 principal + \$109,867  
interest at 6%); (4) On Deck Capital's claim of \$66,464 (\$56,000 principal +  
\$10,464 interest at 4%); (5) TimePayment Corp.'s claim of \$26,111 (\$22,000  
principal + \$4,111 interest at 4%); (6) the County of Madera's claim of  
\$154,195 (\$125,000 principal + \$29,195 interest at 5%); (7) priority  
unsecured tax claims of \$202,000; and (8) non-insider unsecured claims of  
\$112,000.

owned by Marshall and Patel may or may not have had value at this time had the foreclosure not occurred. But the settlement leaves the motel in the hands of First-Citizens Bank's buyer, Oakhurst Lodge, LP. So contrary to the confirmed plan's terms, the settlement relegates equity holders to ownership of an empty shell with shares of no value.<sup>13</sup>

**F. The Settlement Does Not Satisfy § 1127(b)**

Section 1127(b) provides:

The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

Here, the settlement modifies the confirmed plan but does not comply with § 1127(b).

**1. Substantial consummation**

The plan proponent carries the burden that there has been no substantial consummation. *In re Antiquities of Nev., Inc.*, 173 B.R. 926, 929 (9th Cir. BAP 1994). Section 1101(2) provides:

"[S]ubstantial consummation" means--(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.

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<sup>13</sup> First-Citizens Bank argues that Steven Marshall is equitably estopped to oppose this motion. This court does not need to reach this issue. Even if Steven Marshall were estopped, Jack Patel is still presumptively an equity holder with rights under the confirmed plan.

1 Apart from Oakhurst Lodge's initial assumption of its business after  
2 confirmation, First-Citizens Bank has made no showing on the question  
3 of substantial consummation. First-Citizens Bank carries the burden  
4 on that issue, so plan modification must fail.

## 5                   2.     Statutory process for modification

6           Plan modification requires compliance with §§ 1122, 1123, 1125,  
7 1127 and 1129. The settlement does not satisfy § 1127(b) because it  
8 alters the rights of secured creditors, unsecured creditors, and  
9 equity holders without complying with this statutory framework for  
10 modification. The settlement is not presented in the form of a plan  
11 that classifies claims and includes the applicable mandatory  
12 provisions of § 1123(a), such as specifying classes of claims or  
13 interests that are not impaired under the plan and identifying the  
14 treatment of the impaired classes. No disclosure statement has been  
15 approved and transmitted to all creditors under § 1125. See 11 U.S.C.  
16 § 1125, 1127(c). And no holder of a claim or interest has been given  
17 a chance to change such holder's previous acceptance or rejection of  
18 the plan. *Id.* § 1127(d). No evidence has been offered to show that  
19 all requirements of § 1129 have been satisfied.

## 20                   3.     Adequate means of implementation

21           "Notwithstanding any otherwise applicable nonbankruptcy law, a  
22 plan shall . . . provide adequate means for the plan's  
23 implementation." *Id.* § 1123(a)(5). The settlement, deemed a plan  
24 modification, changes how the plan's implementation will be  
25 accomplished. Rather than paying creditors from continued motel  
26 operations, it provides for release of First-Citizens Bank's secured  
27 claims and a one-time cash payment of \$850,000. But as to creditors  
28 other than First-Citizens Bank, it fails to provide a principled basis

1 to determine how the available, but insufficient, funds should be  
2 divided among the pool of non-bank creditors. And having failed to  
3 adhere to the statutory process for modification, the settlement does  
4 not identify the treatment of each class of claims, making it  
5 impossible to perform. As to equity holders, it fails to return the  
6 motel to them, subject to the four deeds of trust, or to provide them  
7 with the unliquidated cash equivalent of their equity interests.

8 **V. CONCLUSION**

9 For each of these reasons, the settlement materially alters  
10 creditors and equity holders' rights under the confirmed plan but does  
11 not satisfy § 1127(b). The motion will be denied. The court will  
12 issue a separate order.

13  
14 Dated: March 28, 2018

15  
16 

17 \_\_\_\_\_  
18 Fredrick E. Clement  
19 United States Bankruptcy Judge  
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**Instructions to Clerk of Court  
Service List**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC or, if checked \_\_\_\_\_, via the U.S. mail.

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